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No. 508

Supreme Court of the United States

OCTOBER TERM, 1948

GEORGE MARRIS,
Petitioner,

VERSUS

NED SOCKEY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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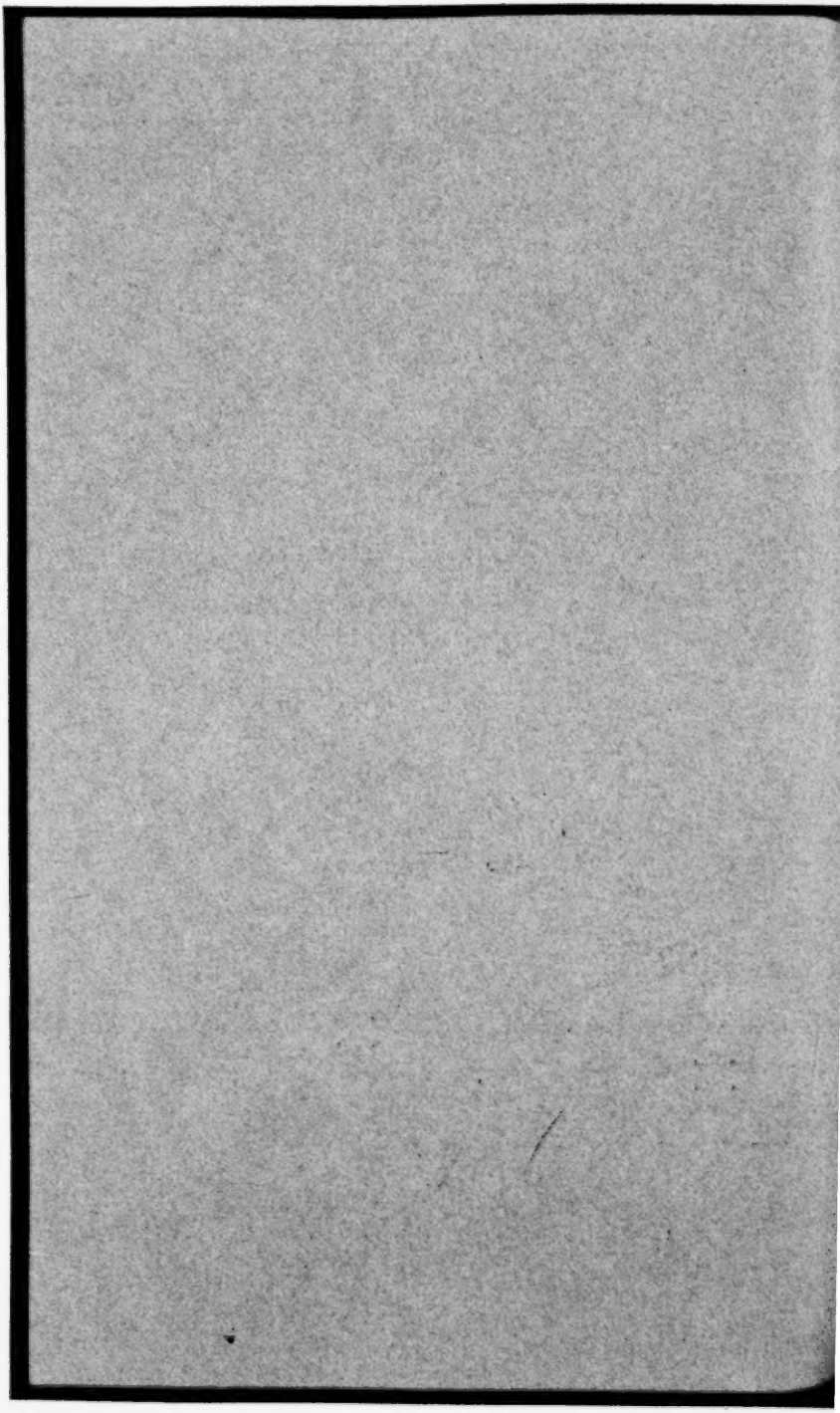

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BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court did not write an opinion; its finding of facts and conclusions of law appear in the transcript at pages 47-56, and its judgment appears in the transcript at pages 56-59. The opinion of the Circuit Court of Appeals appears in the transcript at pages 103-109.

STATEMENT OF THE CASE

The petitioner adopts (B-11) as his statement of facts the statement contained in his petition for writ of certiorari, and while many of those statements are correct, some statements are erroneous and misleading and there are some omissions of facts which we consider important.

Petitioner's statement in his petition for the writ, page 2, to the effect that, "The record here shows that

George Marris and Forgy Marris were never divorced by any decree of any court of competent jurisdiction, Tr. 47.", is entirely without justification. There is nothing on page 47 of the transcript to support such statement and we find nothing in the entire record to justify it. The District Court's finding of fact 17 (Tr. 51) states that certificates were introduced from clerks of certain Oklahoma district courts, "in counties in which Forgy and George Marris were known to have resided," having custody of records of certain United States district courts of Indian Territory, disclosing no divorce proceeding between said parties in *"said Courts."* That finding continues, "There was a failure to show that there had been no divorce obtained by either Forgy or George in the tribal courts * * * ."

In the conclusion of law "F" following the above finding of fact, the District Court said (Tr. 53), "In view of the lapse of time * * * and the absence of proof that divorce was not secured in the Indian Courts prior to April 28, 1904, *or in the United States Courts of Indian Territory* by either of the parties * * * the presumption that Forgy Marris and George Marris were divorced by some lawful means is not overcome" (Emphasis ours). It follows that, directly contrary to the statement of petitioner, the record *fails* to show that George and Forgy were never divorced.

The further statement of petitioner at page 2 of his petition that, "The Constitution and Statutes of the Chickasaw Nation were offered in evidence (Tr. 94-97, incl.), which prohibit a divorce by custom," if intended as a statement that the Chickasaw laws "prohibit a divorce by custom" is misleading as the laws introduced in evidence do

not mention divorce by custom, and petitioner's statement could only amount to his only legal conclusion and not a statement of fact.

In view of these and other discrepancies in petitioner's statement of facts, we include here a statement of facts as follows:

"While George Marris and Forgy Marris lived in Mississippi they entered into the marriage relationship *according to their Choctaw tribal custom* * * * and were living in such relationship when they moved to Indian Territory" (Tr. 29, para. 25, Stipulation); they came to Indian Territory in December, 1902 (Tr. 76), or January, 1903 (Tr. 48), and continued to live together until May, 1903 (Tr. 73), *when they separated according to the Indian custom* (Tr. 48, 73). On March 16, 1904, Forgy Marris, under the name of Virgie Sockey, married one Rafe Sockey by a certificate marriage, the ceremony being performed by a Baptist preacher (Tr. 28). On April 29, 1908, Forgy Marris, under her name of Virgie Sockey, filed petition for divorce from Rafe Sockey in the District Court of Carter County, Oklahoma, and a divorce was granted to her on November 13, 1908 (Tr. 28 and 50-51). On September 28, 1907, in an examination under oath by a Commissioner of the Five Civilized Tribes, George Marris testified that he was not married (Tr. 99). This is the testimony by which George Marris made proof of settlement in the Indian Territory referred to by petitioner in this brief at page 12, but contrary to the statement of petitioner, that proof only referred to the continuous residence of George Marris in the Choctaw Chickasaw country for a period of three years,

and had no reference to the final proof of such facts in regard to the residence of Forgy Marris, and the record does not disclose when she made such proof. In 1910 Forgy Marris married Luther or L. B. Berry, and on June 13, 1929, was divorced from him by a decree of the District Court of Garvin County, Oklahoma, and never married afterwards (Tr. 28). On January 2, 1912, George Marris was married to Lillie McCarty under a marriage license issued by the County Clerk of Carter County, Oklahoma, the ceremony being performed by a justice of the peace, and George Marris continued to reside with the said Lillie McCarty until the time of this trial, of which marriage several children have been born (Tr. 28 and 29).

The 110 acres of land involved in this action was allotted to Forgy Marris, who is duly enrolled as a full-blood Mississippi Choctaw Indian; she died intestate about May 4, 1933, while a resident of Garvin County, Oklahoma, and no administration was had on her estate (Tr. 27). On July 10, 1933, a petition to determine her heirs was filed in the County Court of Garvin County, Oklahoma, in accordance with the provisions of Section 1 of the Act of Congress of June 14, 1918 (40 Stat. 606) (25 U. S. Code 375), and on August 31, 1933, the said County Court rendered its decree finding Ned Sockey to be her sole and only heir (see entire proceedings Tr. 29-43). On the —— day of December, 1946, after this suit was filed, George Marris made an affidavit, witnessed by P. M. Jackson, one of his attorneys of record herein, and another witness, in which he stated that Forgy or Virgie Marris, "died intestate on or about the 5th day of May, 1933; that she left neither father nor brothers, *husband* nor children surviving her" (Tr. 97, 98 and 99).

ARGUMENT

Summary of the Argument.

Point A.

The decision of the Circuit Court of Appeals in this case, is not in conflict with the case of *United States* v. *McCarty*, 144 Fed. (2d) 341, or with any other applicable decisions of this Court, or any other Circuit Court of Appeals.

Point B.

The Circuit Court of Appeals committed no error as contended by petitioner in his petition for *writ of certiorari* and their brief in support thereof. Petitioner's four specifications of error discussed in order

Point A.

The petitioner at page 4 of his petition for writ of certiorari assigns as reason for granting the writ that the decision of the Circuit Court of Appeals in this case is in conflict with the case of *United States* v. *McCarty*, 144 Fed. (2d) 341, decided by the *same* Circuit Court of Appeals. This does not appear to be such a conflict as is contemplated by Section 5B of Rule 38 of this Court, but regardless of whether or not the allegation of the petition is sufficient to bring it within the rule, the opinion of the Circuit Court of Appeals in this case is not in any way in conflict with the same Court's opinion in the case of *United States* v. *McCarty, supra*. In that case, the sole question considered and decided was whether the immoral and illegal conduct of Fred Norton in entering into a second and bigamous marriage while he was still married to Sallie, estopped him from inheriting an interest in Sallie's estate upon her

death. In holding that he was not so estopped, the Court said: "The facts are not in dispute. * * * Fred abandoned Sallie, and on January 10, 1937, *without securing a divorce,* entered into a marriage relationship by statutory ceremony with another woman * * * " (Emphasis ours). It was there admitted that no divorce had been obtained. In the face of such admission no question of presumption of divorce could be urged, and no such question was considered in that case.

On the other hand, in the case at bar there was no such question of estoppel involved or decided by the Circuit Court of Appeals. A reading of the opinion (Tr. 103-109) discloses that the respondent, Ned Sockey, at all times urged three propositions:

> (1) Determination by the County Court of Garvin County, Oklahoma, that Ned Sockey was the sole and only heir of Forgy Marris or Forgy Berry (Tr. 29-43);
>
> (2) That George and Forgy Marris were lawfully divorced by the tribal custom prior to April 28, 1904 (Tr. 21, 23-24);
>
> (3) That there was a presumption of divorce between George and Forgy Marris by reason of their conduct, marriage to other parties and long lapse of time (Tr. 21 and 23).

As to the first proposition the Circuit Court of Appeals, having decided the second and third propositions in respondent's favor, said: "We deem it unnecessary to determine whether the decree of distribution in the County Court of Garvin County was binding on George" (Tr. 109).

As to the second proposition, the Circuit Court of Appeals said: "Accordingly, we conclude that George and

Forgy were lawfully divorced by mutual agreement and permanent separation in accordance with the customs of both the Choctaw and the Chickasaw Tribes prior to 1904" (Tr. 108).

As to the third proposition, the Circuit Court of Appeals said: "The trial court further found that the evidence failed to establish that a divorce was not obtained either by Forgy or George in the tribal courts of the Chickasaw Nation prior to April 28, 1904. That finding under the evidence, as we shall later undertake to show, is not clearly erroneous and is binding on this court" (Tr. 106). "Here, there was a strong presumption that the marriage of George and Forgy had been dissolved at the time George married Lillie McCarty. * * * we do not think his evidence overcame the strong presumption that his marriage with Forgy had been dissolved" (Tr. 109).

The issues involved and the principles of law enunciated by the Court in the two cases were entirely different and no conflict exists. No case of any other Circuit Court of Appeals is pointed out in the petition for the writ, nor is any cited in the brief attached thereto. The questions involved and decided by the Tenth Circuit Court of Appeals are local to that part of the State of Oklahoma formerly comprising the Choctaw and Chickasaw Nations of Indian Territory, and there is little probability that they will be raised in another Circuit.

Point B.

Petitioner's Specifications of Error I and II.

The petitioner, at pages 12 and 13 of his brief, set out four specifications of error and in his argument he treats the first two together. Briefly stated, he complains in these two specifications that the Tenth Circuit Court of Appeals erred in holding that the Arkansas statute as to divorce, put in force in Indian Territory by the Act of Congress of May 2, 1890, 26 Stat. 81, Sec. 31, was not applicable to George and Forgy Marris, Mississippi-Choctaw Indians in 1903; and that said court also erred in holding that said Indians were, at the time in question, amenable to the Chickasaw laws.

The sections of Mills Indian Land Laws, and of Indian Land Laws by Bledsoe, set out in the Appendix to petitioner's brief and relied on in his argument, may be only confusing unless read together with many other sections of said works. The Acts of Congress are quite clear and understandable on most of the questions discussed by petitioner and furnish a safer guide.

As far back as the Treaty of April 28, 1866 (Stat. 769) between the United States and the Choctaws and Chickasaws, and by Article 7 thereof (set out in Appendix No. 3, hereto) it was provided that legislation enacted by Congress, "shall not in any wise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the *rights, laws, privileges or customs* of the Choctaw and Chickasaw Nations respectively" (Emphasis ours).

The Act of March 1, 1889, 25 Stat. 783 (see Appendix No. 4), establishing the first United States Court in Indian Territory provides: "That nothing herein contained shall be so construed as to give the court jurisdiction of controversies between *persons of Indian blood only.*"

The Act of May 2, 1890, 26 Stat. 81, which is the same Act referred to by counsel for petitioner, putting in force in Indian Territory the Arkansas statute in regard to divorce, and in which additional United States Courts were also established in Indian Territory, provides in Section 29 thereof (Appendix No. 5), that such United States Court shall "exercise within the limits of the Indian Territory jurisdiction in all civil cases in the Indian Territory, *except cases over which the tribal courts have exclusive jurisdiction.*" The last paragraph of said Section 29 expressly provides: "That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases *the laws of the State of Arkansas* extended over and put in force in said Indian Territory by the act *shall not apply*" (Emphasis ours).

The Act of March 1, 1895, 28 Stat. 693, authorizing the appointment of additional judges in Indian Territory and for other purposes, again excluded such United States Courts from jurisdiction over controversies, between persons of Indian blood only, by stating in Section 9 of said Act (see Appendix No. 6) that such courts "shall have such original jurisdiction of civil cases as is now vested in the United States courts in the Indian Territory."

It will thus be seen that Congress expressly provided that the laws of Arkansas put in force generally in Indian Territory, did not apply to controversies between persons of Indian blood only, and that the tribal courts retained exclusive jurisdiction of all civil actions, between persons of Indian blood only, until the passage of the Act of April 28, 1904. 33 Stat. 573 (Appendix No. 10).

Counsel for appellant by a highly technical construction of statutes and treaties seek to establish that George and Forgy Marris, Mississippi-Choctaw Indians, were not members of any tribe from the time they arrived in Indian Territory in January, 1903, until a time after the passage of the Act of April 28, 1904; that they had no rights as Choctaw Indians; and that the laws and treaties reserving to the tribal courts jurisdiction in controversies between persons of Indian blood only, were not applicable to George and Forgy. They say that Mississippi-Choctaw Indians "had a right to become a member of the Choctaw Tribe of Indians only under the conditions prescribed by the treaties and Acts of Congress." This is true in the sense that they could not become such members of the tribe as to be entitled to allotment of land in the Choctaw-Chickasaw country, without complying with the applicable laws of Congress. That was equally true of the Choctaws who had resided in Indian Territory since 1830. They also had to be enrolled and comply with the Acts of Congress in order to obtain allotments. Both classes were Choctaw Indians by birth and therefore members of the tribe by birth, not by any Act of Congress, Congress and the treaties merely sought to establish suitable procedure for their *identification* as such members, and orderly selection of their allot-

ments. Surely counsel for petitioner would not urge that other Choctaws and Chickasaws were not amenable to the laws and customs of the tribe until after they were enrolled by the Commission to the Five Civilized Tribes. From the excerpts from acts of Congress and treaties shown in the appendix hereto, it is evident that the tribes and Congress had in good faith attempted to preserve the rights of such Choctaws. By the Treaty of 1830 it was expressly provided that the Choctaws then taking up land and remaining in Mississippi, "shall not lose the privilege of a Choctaw Citizen, except the right to Choctaw annuity (see Appendix No. 1).

The Curtis Act of June 28, 1892 (see Appendix No. 7), provided for the identification of such Choctaws and expressly provided "that nothing contained in this Act shall be so construed as to militate against any rights or privileges" of the Mississippi-Choctaws.

By the Act of May 31, 1900 (see Appendix No. 8), it is provided that any Mississippi-Choctaw duly identified by the Commission shall have the right, at any time prior to the approval of the final rolls of the tribes, "to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of bona fide settlement may be enrolled * * * as Choctaws entitled to allotment."

Section 41 of the Act of July 1, 1902 (see Appendix No. 9), has similar provision for identifying Mississippi-Choctaws; but limiting the time for taking the various steps as Congress was evidently attempting to hasten the completion of enrollment of all the tribes. Section 41 also provided that "all full-blood Mississippi Choctaw Indians"—

and certain others—"who had not moved to and made bona fide settlement in the Choctaw-Chickasaw country prior to June 28, 1898, shall be deemed to be Mississippi-Choctaws, entitled to benefits under Article 14 of the said Treaty of September 27, 1830, and to identification as such by the Commission"

It will be borne in mind that Forgy Marris was a full-blood Mississippi-Choctaw (Tr. 26 and 47).

Section 42 of the Act of July 1, 1902 (see Appendix No. 9), provides for three years continuous residence upon the lands of the Choctaw and Chickasaw nations, including his residence thereon before and after such enrollment, in order for such Mississippi-Choctaw to receive a patent for his allotment.

Certainly there is nothing in all the legislative history to indicate any intention of Congress to deprive these Mississippi-Choctaws of any rights or privileges under the laws and customs of the Choctaws or Chickasaws while living with either of said tribes. The three years residence was a prerequisite to the issuance of a patent only and not to the enjoyment and benefits of Choctaw and Chickasaw tribal laws and customs. The Treaty of June 22, 1855 (see Appendix No. 2), expressly guarantees these rights to all Choctaws and Chickasaws, regardless of whether they reside within the jurisdiction of the Choctaw tribe or the Chickasaw tribe and expressly reserves their right to prosecute suits in the courts of either tribe.

There can be no doubt that when Forgy and George had settled in the Choctaw-Chickasaw country, had been

identified as Mississippi-Choctaws and enrolled as such, they had the same rights under the laws and customs of the tribes as any other Choctaw Indian, and had full right to prosecute suits in the Chickasaw tribal courts.

Over the objection of respondent all of the evidence introduced in the trial court was not brought into the record on appeal (Tr. 66, 67 and 68), and consequently, the record does not disclose the date when Forgy Marris was properly identified by the Commission as a Mississippi-Choctaw, or when she was enrolled as such. There is nothing in the record showing, or from which the inference can be drawn, that Forgy and George were not identified and enrolled as Mississippi-Choctaws prior to April 28, 1904, and prior to the time of their separation. Even if it were necessary that the identification or enrollment, or both, occur before George and Forgy would have access to the tribal courts, or have the benefit of tribal customs (and this we deny), the petitioner cannot now urge that the evidence does not show such facts as he failed to bring into the record all the evidence.

—3 Am. Jur. 223, Sec. 590; 3 Am. Jur. 261, Sec. 659;

Indiana S. R. Co. v. *Liverpool L & G Ins. Co.*, 109 U. S. 168, 27 L. Ed. 895; 3 Sup. Ct. 108;

Halbert v. *U. S.*, 283 U. S. 753, 75 L. Ed. 1389, 51 Sup. Ct. 615.

An examination of the cases cited by the petitioner in his argument on his Specifications of Error I and II, discloses that those cases are based on facts so materially dif-

ferent, and involve issues so foreign to the issues of this case, that they furnish little, if any, assistance in deciding the issues here.

Instead of the highly technical construction sought by petitioner to show that George and Forgy were not members of any Indian tribe and were not entitled to the benefits and protection of tribal laws and customs, these parties are entitled to a liberal construction of the Acts of Congress and treaties to give them such meaning as the Indians would naturally understand them to mean. Certainly there is nothing in these Acts of Congress or treaties which would lead Mississippi-Choctaws to believe that by bona fide settlement in the Choctaw-Chickasaw country for the purpose of acquiring their allotments, they would become a people without a tribe or a country and be deprived of the practice of their tribal customs, or the benefit of the laws of the tribe with whom they had taken up their abode under specific authority by both treaty and Acts of Congress.

This Court has always followed such a rule of liberal construction in favor of Indians.

—*Choate* v. *Trapp*, 224 U. S. 665, 56 L. Ed. 941, 32 Sup. Ct. 565;

Kansas Indians (*BlueJacket* v. *Johnson County*), 5 Wall 737, 760, 18 L. Ed. 667, 674;

Jones v. *Meeham*, 175 U. S. 1, 44 L. Ed. 49, 20 Sup. Ct. 1, 27 Am. Jur. 548, Sec. 11, 27 Am. Jur. 569, Sec. 44.

Petitioner's Specification of Error No. III

Under this specification of error, petitioner urges that Section 4 of the Chickasaw laws on divorce (Tr. 95), was mandatory and consequently divorce by custom was prohibited. This, in addition to the matters urged under his Specifications I and II, goes to validity of the tribal custom divorce between George and Forgy, held to be valid by both the District Court and the Circuit Court of Appeals.

That section is no more mandatory as to divorce, than is Section 4 of an act to record marriages, mandatory as to marriage, which act was passed by the Chickasaw Legislature on October 12, 1876, introduced in evidence by petitioner in the District Court (Tr. 95-96), and that is the same act in regard to marriage which was under consideration by this Court in the case of *Carney* v. *Chapman*, 247 U. S. 102, 62 L. Ed. 1005, wherein this Court said: "There was evidence also that it was customary to disregard solemnization before a judge or a preacher. It would be going somewhat far to construe the Chickasaw statute as purporting to invalidate marriages not so solemnized."

The Oklahoma Supreme Court in the case of *Proctor* v. *Foster*, 107 Okla. 95, 230 Pac. 753, said:

> "This court in a long line of decisions has announced in substance that a marriage contracted between members of the Five Civilized Tribes, in accordance with the customs of such tribe, will be recognized by the courts as a regular and valid marriage. The same effect is also given to the dissolution of marriages under the custom of the tribe as is given to the marriages. *Buck* v. *Branson*, 34 Okla. 807, 127 Pac. 436;

James v. *Adams*, 56 Okla. 450, 155 Pac. 1121, and also *Brokesholder* v. *Brokesholder*, 84 Okla. 249, 204 Pac. 284, and cases cited on page 287."

See also:

—*Johnson* v. *Dunlap*, 68 Okla. 216, 173 Pac. 359, holding valid a Choctaw Tribal divorce;

Sealey v. *Smith*, 81 Okla. 97, 197 Pac 490, involving Chickasaw Indians;

Walls v. *Williamson*, 8 Ala. 48 [quoted at length in the note of 35 L. R. A. (N. S.) 795, wherein the Alabama Supreme Court held a tribal custom divorce between Choctaws to be valid;

Walls v. *Williams*, 11 Ala. 826;

Mayse v. *Newman*, 189 Okla. 586, 118 Pac. (2d) 398;

Coker v. *Moore*, 121 Okla. 219, 249 Pac. 694;

Cyr v. *Walker*, 29 Okla. 281, 116 Pac. 931;

Palmer v. *Cully*, 52 Okla. 454, 153 Pac. 154, in which the Court said:

" 'In the Indian Territory of which the Seminole Nation formed a part, *prior to April 28, 1904*, a marriage or divorce contracted or procured by Indian citizens in accordance with tribal law or custom was valid" (Emphasis ours).

Barnett et al. v. *Prairie Oil & Gas Co.*, 19 Fed. (2d) 504, in which Judge Stone, speaking for the Court in regard to Creek custom marriage and divorce, said:

"Their relations toward each other were largely matters of long established custom. *These tribal cus-*

> *toms might well be denominated as tribal common law.* The marriage relation (both as to creation and termination) was governed by such customs" (Emphasis ours).

The doctrine as to common law marriage adopted by the great majority of the states we think furnishes a perfect analogy to this situation. Most of the states, including the State of Oklahoma, have strict laws in regard to marriages providing that they can be performed in only a certain way and by certain persons, and yet the Supreme Court of Oklahoma held the marriage statute directory and held a common law marriage good. *Love* v. *Love,* 42 Okla. 478, 142 Pac. 305, and many other Oklahoma cases, one of the latest cases being *Aurand* v. *Aurand,* 195 Okla. 643, 161 Pac. (2d) 857. The same rule has been followed in an overwhelming majority of the states as shown by the exhaustive notes in 39 A. L. R. 538, 60 A. L. R. 541, and 94 A. L. R. 1000. The common law rule in the states affects only marriages while the Indian tribal customs, amounting to their common law, covers both marriage and the severance of the marriage relation, amounting to divorce or annulment.

Under these circumstances and under the cases cited, we think it is clear that the Circuit Court of Appeals of the Tenth Circuit committed no error in holding that there was a good and valid tribal divorce between Forgy and George Marris prior to April 28, 1904.

Petitioner's Specification of Error No. IV

By this specification petitioner raises the sole question as to whether or not the presumption of a divorce between George and Forgy Marris was overcome by the testimony of George Marris, and does not question that such presumption was properly drawn unless so overcome. We submit that error of the Circuit Court of Appeals cannot here be predicated upon the sufficiency of the testimony of George Marris to overcome this presumption for three reasons:

(1) Petitioner has not brought into the record before this Court all of the evidence presented to the trial court, and particularly has not brought into the record the testimony of George Marris;

(2) George Marris was not a competent witness to negative the existence of a divorce;

(3) The holding of the Tenth Circuit Court of Appeals on this question is not in conflict with the settled decisions of the Supreme Court of the State of Oklahoma.

> "In order to enable the appellate court to review the weight and sufficiency of the evidence, all of the evidence should, as a general rule, be incorporated in the record by a bill of exceptions or its equivalent."
> —3 Am. Jur. 261, Sec. 659.

It has been held that this Court will not consider questions which cannot be properly decided without appropriate assurance that the record contains all the evidence material to their decision.

> —*Halbert* v. *U. S.*, 283 U. S. 753, 75 L. Ed. 1389, 51 Sup. Ct. 615.

Other cases to the same general effect are *Russell* v. *Ely*, 2 Black (67 U. S.), 575, 580, 17 L. Ed. 258, 260, wherein the Court said:

> "It is true that this court does not see anything in that part of Baker's testimony embodied in the bill of exceptions which justifies such an inference. But the bill of exceptions does not purport to give all that he said and according to a well known rule, this court, under such a condition of the record, is bound to presume that there was that in Baker's testimony which justified the instruction."

Gardner v. *Babcock*, 3 Wall (70 U. S.), 240-244, 18 L. Ed. 31, wherein the Court said:

> "The bill of exceptions does not purport to contain all the evidence on the trial, nor even the substance of it * * * Such being the case, the correctness of the finding of the jury is not involved, and every presumption is in favor of the verdict, and that it was supported by the evidence on the trial."

Texas & Pacific Ry. Co. v. *Cox*, 145 U. S. 593-606, 36 L. Ed. 829-834, 12 Sup. Ct. 905, wherein the Court said:

> "The bill of exceptions does not purport to contain all the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed."

Krauss Bros. Lbr. Co. v. *Mellon*, 276 U. S. 386-390, 72 L. Ed. 620, 48 Sup. Ct. 358, wherein the Court said:

> "It has always been ruled in such a case that if a bill of exceptions does not contain all the evidence, it will be presumed that the evidence omitted was sufficient to justify a refusal to grant the motion."

The testimony of George Marris is not contained in the record, and the only information as to the substance of any part of his testimony is contained in the Finding of Fact No. 17 of the Court (Tr. 51), which does not, in any way, indicate that the court attempts to set the complete substance of his testimony. It may be that his complete testimony induced the court to believe that he was wholly unworthy of belief, and it may be that the court took into consideration the statement of George Marris made under oath in 1907 that he was not married (Tr. 99), which statement is apparently inconsistent with that part of his statement referred to in the court's finding to the effect that he had not obtained a divorce or been served with process in such a proceeding.

Oklahoma has a statute similar to the statute in most states (set out in Appendix No. 11), providing that no party to a civil action shall be allowed to testify in his own behalf in respect to a transaction with a deceased person under circumstances in the statute set out. We believe that the circumstances in this case bring George Marris clearly within the terms of said statute as an incompetent witness. This rule has been applied where a woman claimed to be the common law wife of a deceased person. *Shorten* v. *Judd* (Kan.), 42 Pac. 327. In a case where the issue arose as to whether a woman was divorced from a decedent at the time of his death, it was said:

> "We are therefore clearly of the opinion that the plaintiff was not a competent witness in this case to testify, as she did, to matters regarding or tending to impeach the decree of divorce rendered by the circuit

court of Mercer County, Ill., in the case of Alexander Lieber against Margaret Lieber, the defendant there, and the plaintiff here."

—*Lieber* v. *Lieber* (Mo.), 143 S. W. 458.

We think the only effect that could be given to the testimony of George Marris is that any statements made by him may be used against him as admissions against his interest. 20 Am. Jur. 504, Sec. 594, 22 C. J. 345, Sec. 397, *Forrister* v. *Sullivan* (Mo.), 132 S. W. 722.

In this connection, we wish to call to the attention of the Court that the affidavit of George Marris referred to by petitioner in his brief at page 20, and erroneously stated to appear at page 95 of the transcript, when, in fact, it appears in the transcript at pages 97 and 98, was not offered in evidence by the respondent, Ned Sockey, but as shown (Tr. 97), was Exhibit "B" of the Hibdon claimants, who were claiming title adverse to Ned Sockey, but did not appeal from the decision of the District Court. Nevertheless, under these circumstances, the statement in said affidavit that Forgy Marris died leaving no husband can be used as an admission against his interest.

The holding of the Tenth Circuit Court of Appeals that the presumption of divorce between George and Forgy was not overcome by the testimony of George Marris is not in conflict with settled decisions of the Supreme Court of the State of Oklahoma. There are in the various states two conflicting rules in regard to the weight of the evidence necessary to overcome the presumption, and petitioner is

urging the minority rule. Referring to the force and effect of this presumption and the proof necessary to overcome it, it is said in 35 Am. Jur. 309, Sec. 197:

> "The question of when the presumption may be raised verges on being, if it is not in fact, the same question as is involved in the matter of what evidence is necessary to overcome the presumption; in this connection it should be observed that the majority view is that it must be shown, to overcome the presumption, by plenary proof that neither party to the previous marriage had obtained a divorce, while the minority view is that such plenary proof is not necessary to overcome the presumption, which ceases to exist when proof is introduced on both sides of the issues." See also 35 Am. Jur. 323, Sec. 218.

There are statements in the cases of *Madison* v. *Steckleberg,* 101 Okla. 237, 224 Pac. 961, *Brokesholder* v. *Brokesholder,* 84 Okla. 249, 204 Pac. 284, and other cases cited by petitioner, which indicate an adherence to the minority rule, but the great majority of the Oklahoma cases decided both before and after the cases cited by petitioner, appear to follow the majority rule. There is no statement or indication in the case cited by petitioner of an intention by the Supreme Court of Oklahoma to overrule those cases following the majority rule. In fact, even in those cases cited by petitioner the minority rule is not strictly applied, but some of those cases seem to be decided in a way that would indicate application of the majority rule. For instance, in the case of *Madison* v. *Steckleberg, supra,* Milea Tiger was attempting to establish an interest in the estate

of Jesse Davis, to whom she claimed to have been married, but she had formerly been married to Ledke Tiger. The Court said:

> "It then becomes necessary to determine the sufficiency of the evidence to overcome the presumption that Milea Tiger and Ledke Tiger had been divorced prior to the marriage of Jesse Davis to Milea Tiger. Milea Tiger testified that she was married to Ledke Tiger about ten years ago and that she had never been divorced from him. She also testified that Ledke Tiger had never brought suit for divorce and that Ledke Tiger was still living and residing at Okemah, in this state."

She was a competent witness to testify as to this transaction with Ledke Tiger as he was still living, and certainly her testimony was an admission against her interest. In deciding the case, the Court said:

> "It is our opinion, therefore, that that portion of the judgment of the trial court holding that Milea Tiger was the legal wife of Jesse Davis and entitled to inherit an interest in his estate was clearly against the weight of the evidence."

Certainly there is nothing in this holding that is contrary to the majority rule above stated.

The majority rule is followed by the following Oklahoma cases:

—*Haile* v. *Hale*, 40 Okla. 101, 135 Pac. 1143;

Chancey v. *Whinnery*, 47 Okla. 272, 147 Pac. 1036;

Jones v. *Jones*, 63 Okla. 208, 164 Pac. 463;

Thomas v. *James*, 69 Okla. 285, 171 Pac. 855;

Templeton v. *Jones*, 127 Okla. 1, 259 Pac. 543;
Sam v. *Sam*, 172 Okla. 342, 45 Pac. (2d) 462;
Hill v. *Jones*, 180 Okla. 330, 69 Pac. (2d) 324.

In all these cases a good deal of evidence was introduced to overcome the presumption of a divorce prior to the last marriage, but in each case the evidence was held to be insufficient to overcome the presumption.

In the case of *Chancey* v. *Whinnery, supra*, the Court, after asserting that, "this is one of the strongest presumptions known to law," further states:

> "When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a presumption of its legality, not only casting the burden of proof on the party objecting, but requiring him throughout and in every particular *plainly* to make the fact appear, *against the constant pressure of this presumption*, that it is illegal and void" (Emphasis ours).

In the case of *Thomas* v. *James, supra*, it is said:

> "This burden is substantial, and is not met by proof of facts from which mere inferences may be drawn."

In the case of *Templeton* v. *Jones*, the Court said:

> "Where the evidence is not *sufficiently clear or satisfactory* that a party to a second marriage had not obtained a divorce from the prior spouse, the trial court is justified in holding that the presumption of divorce from such prior spouse had not been overcome."

In the same case, the Court further states:

> "That the presumption is so strong that they had been divorced that it overcomes any other presumption."

In that case Robert Rabbit was in substantially the same position as is George Marris in this case and the Court said: "In our judgment little weight should be given to the testimony of Robert Rabbit."

In the case of *Sam* v. *Sam, supra,* the Court said:

> "Where a marriage has been consummated, a litigant who asserts the invalidity thereof, because one of the parties thereto has been formerly married, and the spouse of such former marriage is still living, is confronted with the constant and persistent presumption that the former marriage was legitimately terminated, *which requires clear, cogent, and convincing evidence to overcome*" (Emphasis ours).

In the case of *Hill* v. *Jones, supra,* which is a later case than any case cited by petitioner in his brief, the Court quotes at length from the case of *Chancey,* v. *Whinnery, supra,* and again lays down the rule that the party seeking to negative the fact of a divorce prior to a marriage is required "plainly to make the facts appear" that such divorce was not obtained. The Court reviews the evidence introduced to establish the fact that no such divorce was obtained, but holds the evidence insufficient to overcome the presumption.

We think these cases clearly show that the holding of the Tenth Circuit Court of Appeals was not in conflict with the settled decisions of the Supreme Court of the State of Oklahoma.

CONCLUSION

We submit that the petitioner has shown no proper reason why the writ of certiorari should be granted in this case. In the case of *Magnum Import Co., Inc.*, v. *Cody*, 262 U. S. 159, 43 Sup. Ct. 531, 67 L. Ed. 922, this Court said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, *first* to secure uniformity of decisions between those courts in the nine circuits, and *second*, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

It appears to us that this case falls within the eighty per cent above referred to, and we respectfully urge that the writ of certiorari be denied.

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APPENDIX

For convenience, the entries in this Appendix will be numbered.

No. 1.

Article 14 of the Treaty of September 27, 1830, 7 Stat. 333, after providing certain rights to land in Mississippi to the Choctaws who remained in that state included this final sentence:

> "Persons who claim under this Article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not entitled to any portion of the Choctaw annuity."

No. 2.

The Treaty of June 22, 1855, 11 Stat. 611, between the United States and the Choctaw-Chickasaw Nations, in Article 5 thereof, provided:

> "ARTICLE 5. The members of either the Choctaw or the Chickasaw tribe, shall have the right, freely, to settle within the jurisdiction of the other, and shall thereupon be entitled to all rights, privileges, and immunities of citizens thereof; but no member of either tribe shall be entitled to participate in the funds belonging to the other tribe. Citizens of both tribes shall have the right to institute and prosecute suits in the courts of either, under such regulations as may, from time to time, be prescribed by their respective legislatures."

No. 3.

Article VII of the Treaty of April 28, 1866, 14 Stat. 769, between the Choctaws, Chickasaws and the United States, provided:

"The Choctaws and Chickasaws agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory; provided, however, *such legislation shall not in any wise interfere with or annul their present tribal* organization, or their respective legislatures or judiciaries, or the rights, laws, privileges or *customs* of the Choctaw and Chickasaw Nations respectively."

No. 4.

The Act of March 1, 1889, 25 Stat. 783, establishing a United States Court at Muskogee, placed the Chickasaw district and part of the Choctaw district under the jurisdiction of the United States Court for the Eastern District of Texas, and after defining the jurisdiction of such United States courts over the Indian Territory, Section 6 thereof contains this provision:

"That nothing herein contained shall be so construed as to give the court jurisdiction of controversies between persons of Indian blood only."

No. 5.

The Act of May 2, 1890, 26 Stat. 81, establishing additional United States Courts in Indian Territory, in Section 29 thereof, provides:

"And the jurisdiction of the United States court established under and by virtue of an act entitled 'An act to establish a United States court in the Indian Territory, and for other purposes,' approved March first, eighteen hundred and eighty-nine, is hereby limited to and shall extend over the Indian Territory as defined in this section; that the court established by said act shall, in addition to the jurisdiction conferred

thereon by said act, have and exercise within the limits of the Indian Territory jurisdiction in all civil cases in the Indian Territory, *except cases over which the tribal courts have exclusive jurisdiction,*"

The last paragraph of said Section 29 is as follows:

"*Provided, however,* That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian Territory by this act shall not apply."

No. 6.

The Act of March 1, 1895, 28 Stat. 693, provides:

"SEC. 9. That the United States court in the Indian Territory shall have exclusive original jurisdiction of all offenses committed in said Territory, of which the United States court in the Indian Territory now has jurisdiction, and after the first day of September, eighteen hundred and ninety-six, shall have exclusive original jurisdiction of all offenses against the laws of the United States, committed in said Territory, except such cases as the United States court at Paris, Texas, Fort Smith, Arkansas, and Fort Scott, Kansas, shall have acquired jurisdiction of before that time; *and shall have such original jurisdiction of civil cases as is now vested in the United States court in the Indian Territory,*" (Emphasis ours).

No. 7.

The Act of June 28, 1898, 30 Stat. 495 (known as the Curtis Act), Sec. 21, in part provides:

"Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.

* * * * * * * *

"No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship:

"*Provided, however,* That nothing contained in this Act shall be construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States."

No. 8.

The Act of May 31, 1900, 31 Stat. 221, provides in part at Section 232 of said statute, as follows:

" * * * *Provided,* that any Mississippi Choctaw duly identified as such by the United States Commission to the Five Civilized Tribes shall have the right, at any time prior to the approval of the final rolls of the Choctaws and Chickasaws by the Secretary of the Interior, to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of bona fide settlement may be enrolled by the said United States Commission and by the Secretary of the Interior as Choctaws entitled to allotment: *Provided further,* That all contracts or agreements looking to

the sale or incumbrance in any way of the lands to be allotted to said Mssissippi Choctaws shall be null and void."

No. 9.

The Act of July 1, 1902, 32 Stat. 641 (known as the Choctaw and Chickasaw Supplemental Agreement), provides in part:

"41. All persons duly identified by the Commission to the Five Civilized Tribes under the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stats. 495), as Mississippi Choctaws entitled to benefits under article 14 of the treaty between the United States and the Choctaw Nation concluded September 27, 1830, may, at any time within six months after the date of their identification as Mississippi Choctaws by the said Commission, make bona fide settlement within the Choctaw-Chickasaw country, and upon proof of such settlement to such Commission within one year after the date of their said identification as Mississippi Choctaws shall be enrolled by such Commission as Mississippi Choctaws entitled to allotment as herein provided for citizens of the tribes, subject to the special provisions herein provided as to Mississippi Choctaws, and said enrollment shall be final when approved by the Secretary of the Interior. The application of no person for identification as a Mississippi Choctaw shall be received by said Commission after six months subsequent to the date of the final ratification of this agreement and in the disposition of such applications all full-blood Mississippi Choctaw Indians and the descendants of any Mississippi Choctaw Indians whether of full or mixed blood who received a patent to land under the said fourteenth article of the said treaty of eighteen hundred and thirty who had not moved to and made bona fide

settlement in the Choctaw-Chickasaw country prior to June twenty-eighth, eighteen hundred and ninety-eight, shall be deemed to be Mississippi Choctaws, entitled to benefits under article fourteen of the said treaty of September twenty-seventh, eighteen hundred and thirty, and to identification as such by said commision, * * *

"42. When any such Mississippi Choctaw shall have in good faith continuously resided upon the lands of the Choctaw and Chickasaw nations for a period of three years, including his residence thereon before and after such enrollment, he shall, upon due proof of such continuous, bona fide residence, made in such manner and before such officer as may be designated by the Secretary of the Interior, receive a patent for his allotment, *as provided in the Atoka agreement*, and he shall hold the lands allotted to him as provided in this agreement for citizens of the Choctaw and Chickasaw nations" (Emphasis ours).

No. 10.

The Act of April 28, 1904, 33 Stat. 573, provides:

"SEC. 2. All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise."

No. 11.

Title 12, Sec. 384, of the Oklahoma Statutes of 1941, provides:

"No party to a civil action shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person, where such party has acquired title to the cause of action immediately from such deceased; * * * "